94

No. 07-1180

FILED
JUN 3 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

DEFENDERS OF WILDLIFE AND SIERRA CLUB,

Petitioners,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY

Respondent.

On Petition for a Writ of Certiorari to the United States District Court for the District of Columbia

REPLY BRIEF FOR PETITIONERS

ANDREW J. PINCUS
CHARLES A. ROTHFELD
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

ROBERT DREHER
BRIAN SEGEE
Defenders of Wildlife
1130 17th Street NW
Washington, DC 20036
(202) 772-3225

Counsel for Defenders of Wildlife

DAN M. KAHAN
Counsel of Record
TERRI-LEI O'MALLEY
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. This Court Should Grant Review Now To Resolve Definitively The Continuing Controversy Surrounding The Constitutionality Of The Secretary's Waiver Authority. 2

B. Judicial Review Is An Essential Element Of The Intelligible Principle Standard. 8

C. The Secretary's Waiver Is Equivalent To The Repeal Invalidated In *Clinton*. 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES:

Chicago & S., Air Line v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) 9

Clinton v. *City of New York.*, 524 U.S. 417 (1998) 10

County of El Paso v. *Chertoff*, No. 08-0196 (W.D. Tex. filed June 2, 2008) 5

Dalton v. *Specter*, 511 U.S. 462 (1994) 9

Field v. *Clark*, 143 U.S. 649 (1892) 10,11

Franklin v. *Massachusetts*, 505 U.S. 788 (1992) 9

Gould v. *Bowyer*, 11 F.3d 82 (7th Cir. 1993) 5

Lincoln v. *Vigil*, 508 U.S. 182 (1993) 9

NLRB v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1988) 9

South Dakota v. *Dep't of Interior*, 69 F.34d 878 (8th Cir. 1995), vacated, 519 U.S. 919 (1996) 6

Touby v. *United States*, 500 U.S. 160 (1991) 7

United States v. *Bozarov*, 974 F. 2d 1037 9th Cir. 1992) 7

United States v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 9

United States v. *Widdowson*, 916 F.2d 587 (10th Cir. 1990), vacated, 502 U.S. 801 (1991) 7

United States ex rel. Knauff v. *Shaughnessy* 338 U.S. 537 (1950) 9

TABLE OF AUTHORITIES—continued

Page(s)

Texas Border Coalition v. *Chertoff*, No. 08-00848 (D.D.C. filed May 16, 2008) 5

STATUTES:

Administrative Procedure Act. 5 U.S.C. § 551 et seq.) 3

American Indian Religious Freedom Act, 42 U.S.C. § 1996) 3

Archaeological and Historic Preservation Act, 16 U.S.C. § 469 et seq.);

Archeological Resources Protection Act, 16 U.S.C. § 470aa *et seq*..... 3

Arizona Desert Wilderness Act Pub. L. No.101-628;

301(a)..... 3

301(b)..... 3

301(c)..... 3

301(d) 3

301(e)..... 3

301(f) 3

Antiquities Act, 16 U.S.C. § 431 *et seq.* 3

California Desert Protection Act (Pub. L. 103-433), 50 Stat. 1827..... 3

Clean Air Act, 42 U.S.C. § 7401 et seq. 3

Coastal Zone Management Act , 16 U.S.C. § 1451 *et seq.* 3

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* 3

TABLE OF AUTHORITIES—continued

Page(s)

Eagle Protection Act, 16 U.S.C. § 668 *et seq.*; the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.); 3

Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* 3

Farmland Protection Policy Act, 7 U.S.C. § 4201 *et seq.* 3

Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. § 461 et seq.) 3

California Desert Protection Act, Pub. L. No. 103-433, 50 Stat. 1827 3

Endangered Species Act, 16 U.S.C. § 1531 et seq. 3

Federal Water Pollution Control Act (commonly referred to as the Clean Water Act, 33 U.S.C. § 1251 et seq. 3

Fish and Wildlife Act of 1956 (Pub. L. 84-1024, 16 U.S.C. 742a, et seq.) 3

Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.* 3

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 § 102, (codified as amended at 8 U.S.C. § 1103 note 1, 2, 6, 7, 11

Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq. 3

Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. § 528-531 3

National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* 3

TABLE OF AUTHORITIES—continued

Page(s)

National Forest Management Act of 1976, 16 U.S.C. § 1600 et seq. 4

National Historic Preservation Act, 16 U.S.C. § 470 et seq 3

National Parks and Recreation Act of 1978, Pub. L. No. 95-625 3

§ 401(7) 3

§ 403 3

§ 404 3

National Park Service General Authorities Act, 16 § U.S.C. 1a-1 et seq 3

National Park Service Organic Act, 16 U.S.C. §§1, 2-4) 3

National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd-668ee 3

Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* 3

Noise Control Act, 42 U.S.C. § 4901 *et seq.* 3

Otay Mountain Wilderness Act of 1999, Pub. L. No. 106-145 2

§ 102(29) 2

§ 103 2

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb) 3

Rivers and Harbors Act of 1899, 33 U.S.C. § 403) 3

Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*; the Noise Control Act, 42 U.S.C. § 4901 et seq.) 3

TABLE OF AUTHORITIES—continued

Page(s)

Secure Fence Act, Pub. L. No. 190-367, § 2(a), 120 Stat. 2638 8

Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* 3

Wild and Scenic Rivers Act, 16 U.S.C. § 1281 *et seq.* 3

Wilderness Act, 16 U.S.C. § 1131 *et seq.* 3

MISCELLANEOUS:

73 Fed. Reg. 19,077 (Apr. 8, 2008) 3

73 Fed. Reg. 18, 293 (Apr. 3, 2008) 3

Border Fence Waivers Show Feds' Arrogance, The San Antonio Express-News, Apr. 3, 2008, *available at* http://www.mysan antonio.com/ opinion/ editorials/ stories/ MYSA040408.01O.Fence1ed.25ff92c.html 5

Flattened By The Wall: Fence-Builders Should Not Be Allowed to Bulldoze Past All Laws, The (Syracuse) Post-Standard, Apr. 15, 2008, *available at* http://www.syracuse.com/ opinion/ index.ssf?/ base/ opinion-2/ 1208249823169420.xml&coll=1; Op. Ed. 4

Michael Chertoff's Insult, The New York Times, April 3, 2008, *available at* http://www.nytimes.com/ 2008/ 04/ 03/ opinion/ 03thu3.html?_r=1&em&ex=1207368000&en=4c861a0cf3a609a3&ei=5087%0A&oref=slogin 5

Rusty Dornan, *Border-fence Dispute Snares Rare Jaguars*, CNN, May 5, 2008, *available at* http://www.cnn.com/ 2008/

TABLE OF AUTHORITIES—continued

Page(s)

TECH/ science/ 05/ 05/ jaguars.fence/index.html; Op. Ed. 4

U.S. Wrong to Bypass Laws for Border Fence, The San Diego Union Tribune, Apr. 3, 2008, *available at* http://www.signonsandiego.com/ news/ op-ed/ editorial1/ 20080403-9999-lz1ed3top.html; Op. Ed. 4

Wall Project Must Not Trample Citizens' Rights, Prerogatives, The Arizona Daily Star, Apr. 3, 2008, *available at* http://www.azstarnet.com/ altds/pastframe/opinion/232564; Op. Ed. 4

Skirting of Rules Shows Hypocrisy of Government, The Yuma Sun, Apr. 2, 2008, *available at* http://www.yumasun.com/ opinion/ rules_40766___article.html/ hypocrisy_roads.html 4

The government strives mightily to depict the Secretary's Section 102(c) waiver authority as a commonplace measure indistinguishable from prior delegations of legislative power and prior waiver provisions upheld by this Court. That argument ignores reality, including:

- The three amicus briefs that confirm the continuing importance of the constitutional questions presented in the petition as well as the waiver authority's constitutional defects;
- The Secretary's new, and extremely broad, April 2008 waivers—not even discussed by the government—that have engendered very substantial controversy, including new lawsuits challenging the validity of Section 102(c) waivers;
- The government's inability to point to even a single decision by this Court relying on the intelligible principle standard to uphold a statute against a delegation challenge where the exercise of the delegated authority was not subject to some form of judicial review for compliance with the congressional standard. The district court rulings on which the government relies thus have no support in this Court's decisions.

Only this Court can dispel the profound and persistent state of uncertainty that attends the Secretary's continuing issuance of waivers and the associated continued stream of litigation. "There are of course no court of appeals decisions" (Opp. 9 n.4) permitted under the truncated jurisdictional provisions at issue. District court decisions, by their nature, cannot generate binding precedent even within,

much less across, particular districts. Until this Court addresses these issues, therefore, there will be no authoritative answers to the important constitutional questions posed by the Secretary's extraordinarily broad waiver authority—and its insulation from judicial review for compliance with Congress's standard—that is at issue in this case.

The government opposes certiorari on the ground that further review would frustrate the goal of expedition reflected in the "special statutory framework" (Opp. 10) that eliminates court of appeals review and bars consideration of nonconstitutional claims anywhere. But the newly-filed litigation over Section 102(c), combined with the truncated review provisions and the short time-frame for the proposed construction of the fence, make immediate review by this Court imperative. Contrary to the government's claim, the Secretary's "statutory obligation to achieve operational control over the Nation's borders within a matter of months" (Opp. 11) is not a reason to deny certiorari; rather, it is a reason to *grant* review and then to expedite this Court's consideration of the case, a procedure petitioners would welcome.

A. This Court Should Grant Review Now To Resolve Definitively The Continuing Controversy Surrounding The Constitutionality Of The Secretary's Waiver Authority.

The government opposes certiorari on the ground that "there is no split of authority" concerning the constitutionality of Section 102(c) of IIRIRA (Opp. 9). This attempt to force-fit the "circuit conflict" template onto the petition ignores the principal grounds presented for granting certiorari: the persistent state of legal controversy that will attend the continuing

exercise of the Secretary's waiver authority; the division in the lower courts with respect to the role of judicial review in nondelegation analysis; and the inability of district courts to abate such controversy.

1. Any doubt regarding the continuing importance of the legal issues presented here is eliminated by the Secretary's issuance in April 2008 of two new waivers, one of 27 laws covering 22 miles of fencing in Hidalgo County, Texas, 73 Fed. Reg. 19,077 (Apr. 8, 2008), the other wiping out over 35 laws with respect to more than *four hundred seventy miles* of fence in *four states*, 73 Fed. Reg. 18,293 (Apr. 3, 2008).[1]

---

[1] The broader waiver applies to the following federal statutes, as well as "all federal, state or other laws, regulations, and legal requirements of, deriving from, or related to the subject" of these laws: National Environmental Policy Act, (42 U.S.C.§ 4321 et seq.)); the Endangered Species Act, 16 U.S.C. § 1531 et seq.)); the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) (33 U.S.C. 1251 et seq.)); the National Historic Preservation Act 16 U.S.C. § 470 et seq.)); the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq.); the Clean Air Act, 42 U.S.C. § 7401 et seq.; the Archeological Resources Protection Act, 16 U.S.C. § 470aa et seq.; the Safe Drinking Water Act, 42 U.S.C. § 300f et seq.; the Noise Control Act, 42 U.S.C. § 4901 et seq.); the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.; the Archaeological and Historic Preservation Act, 16 U.S.C. § 469 et seq.; the Antiquities Act, 16 U.S.C. § 431 et seq.); the Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. § 461 et seq.); the Wild and Scenic Rivers Act, 16 U.S.C. § 1281 et seq.; the Farmland Protection Policy Act, 7 U.S.C. § 4201 et seq.; the Coastal Zone Management Act, 16 U.S.C. § 1451 et seq.; the Wilderness Act, 16 U.S.C. § 1131 et seq.; the Federal Land Policy and Management Act, 43 U.S.C. § 1701 et

The scope and diversity of the abrogated laws is breathtaking. Cast aside are not just every significant environmental protection and land use statute but also laws protecting Native American graves and religious practices as well as freedom of religion generally. The Secretary has waived the organic act of one executive agency (the National Park Service) in its entirety. He has even eliminated protection of the bald eagle, the symbol of our Nation.

Not surprisingly, given the impact of the Secretary's most recent waivers and the immense public controversy surrounding them,[2] this case is not the

seq.); the National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd-668ee); the Fish and Wildlife Act of 1956, 16 U.S.C. § 742a, et seq.; the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq.; the Administrative Procedure Act, 5 U.S.C. § 551 et seq.; the Otay Mountain Wilderness Act of 1999, Pub. L. No. 106-145; Sections 102(29) and 103 of Title I of the California Desert Protection Act, Pub. L. No, 103-433, 50 Stat. 1827, the National Park Service Organic Act, 16 U.S.C. § 1, 2-4); the National Park Service General Authorities Act, 16 U.S.C. §1a-1; Sections 401(7), 403, and 404 of the National Parks and Recreation Act of 1978, Pub. L. No. 95-625; Sections 301(a)-(f) of the Arizona Desert Wilderness Act, Pub. L. No. 101-628; the Rivers and Harbors Act of 1899, 33 U.S.C. § 403); the Eagle Protection Act, 16 U.S.C. § 668 et seq.; the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq.; the American Indian Religious Freedom Act, 42 U.S.C. § 1996; the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb; the National Forest Management Act of 1976, 16 U.S.C. § 1600 et seq., and the Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. § 528-531).

[2] See, *e.g.*, Rusty Dornan, *Border-fence Dispute Snares Rare Jaguars*, CNN, May 5, 2008, *available at* http://www.cnn.com/2008/ TECH/ science/ 05/ 05/ jaguars.fence/index.html; Op. Ed., *Flattened By The Wall: Fence-Builders Should Not Be Allowed to Bulldoze Past All Laws*, The (Syracuse) Post-Standard, April 15, 2008, *available at* http://www.syracuse.com/ opinion/ index.ssf?/ base/ opinion-2/ 1208249823169420.xml&coll=1; Op.

only pending challenge to the Secretary's actions. Two new suits have been filed in the last month alone. See *County of El Paso* v. *Chertoff*, No. 08-0196 (W.D. Tex. filed June 2, 2008); *Texas Border Coalition* v. *Chertoff*, No. 08-00848 (D.D.C. filed May 16, 2008).

By granting review here, this Court would resolve conclusively the issue in those cases; otherwise, that litigation—and the associated uncertainty—will continue. Absent review by *this* Court, moreover, *none* of these district court lawsuits will quiet the controversy surrounding the fence, because none, as a matter of law, can. It is well established that district court decisions do not create binding precedent for other district courts, either within or across districts. See, *e.g.*, *Gould* v. *Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993) (Posner, J.) ("[a] district court decision binds no judge in any other case"). Because Congress, in addition to restricting district court review

---

Ed., *U.S. Wrong to Bypass Laws for Border Fence*, The San Diego Union Tribune, Apr. 3, 2008, *available at* http://www.signonsandiego.com/ news/ op-ed/ editorial1/ 20080403-9999-lz1ed3top.html; Op. Ed., *Wall Project Must Not Trample Citizens' Rights, Prerogatives*, The Arizona Daily Star, Apr. 3, 2008, *available at* http://www.azstarnet.com/ altds/pastframe/opinion/232564; Op. Ed., *Skirting of Rules Shows Hypocrisy of Government*, The Yuma Sun, Apr. 2, 2008, *available at* http://www.yumasun.com/ opinion/ rules_40766___article.html/ hypocrisy_roads.html; Editorial, *Border Fence Waivers Show Feds' Arrogance*, The San Antonio Express-News, Apr. 3, 2008, *available at* http://www.mysanantonio.com/ opinion/ editorials/ stories/ MYSA040408.01O.Fence1ed.25ff92c.html; Editorial, *Michael Chertoff's Insult*, N.Y. Times, Apr. 3, 2008, *available at* http://www.nytimes.com/ 2008/ 04/ 03/ opinion/ 03thu3.html?_r=1&em&ex=1207368000&en=4c861a0cf3a609a3&ei=5087%0A&oref=slogin.

to constitutional challenges, extinguished jurisdiction of the courts of appeals to review decisions challenging the Secretary's waivers (IIRIRA § 102(c)(2)(A)-(C)), the *only* court that can authoritatively resolve the issue presented in this case is *this* one. Until that happens, adversely affected parties will continue to seek legal redress, the federal government will continue to expend the resources necessary to defend the Secretary's actions, and district courts will continue to be obliged to render decisions, for as long as it takes the Government to complete the border fence.[3]

2. We explained in the petition (at 15-16) that the district court's ruling (and the government's position) conflict with lower court decisions in other statutory contexts holding that the availability of statutory judicial review is essential to upholding delegations of legislative authority under the intelligible principle standard.

The government responds (Opp. 9) that "this Court vacated the only decisions * * * that invalidated statutory provisions on unconstitutional delegation grounds because of the unavailability of judicial review." But this Court did not reject the principle that judicial review is a key element of the intelligible principle test. To the contrary, that principle was reaffirmed in both cases—in *South Dakota*, the government voluntarily revised its regulation to authorize judicial review (rather than seeking reversal

---

[3] Although the 14-mile fence segment that was the subject of the waiver at issue in this action has been substantially completed, the government concedes (Op. 8-9 n.3) that the continuing possibility of relief to abate violations of law associated with that fence segment precludes a claim of mootness.

of the lower court's decision on the merits) and sought a remand for reconsideration (Pet. 15-16 n.5); and in *Widdowson* the Court remanded for reconsideration in light of its decision in *Touby* that the relevant statute provided sufficient judicial review to satisfy the nondelegation doctrine's requirement.

The government also fails even to acknowledge the two appellate decisions in which courts upheld delegations on the ground that the relevant statutes provided for judicial review (see Pet. 15). And it ignores the fact that in *Bozarov*, which the government characterizes as "the most relevant decision" (Opp. 10), the court of appeals expressly relied on the availability of some judicial review in upholding the delegation (see Pet. 16 n.6).

The lower court decisions thus confirm that judicial review is a key part of the intelligible principle test. Indeed, the government does not point to a single lower court decision outside the Section 102(c) context endorsing its position that judicial review is irrelevant. The stark contrast between the decision below and the other lower courts' decisions addressing this issue provides yet another basis for granting review here.[4]

---

[4] The government states (Opp. 15) that the legal argument advanced in the petition was "neither pressed nor passed upon in the court below * * *." But the government does not make a claim of waiver, nor could it. The contention that Section 102(c) violates the nondelegation doctrine was squarely advanced below, and that argument relied in part on the lack of judicial review. Certainly the government, which frequently modifies in this Court the legal arguments advanced in lower courts, does not argue that a party may only advance in this Court the precise legal argument it advanced below.

3. As the government notes, Congress directed the Secretary to take "all actions the Secretary determines necessary and appropriate," including the construction of fences, "to achieve and maintain operational control over the entire" United States border within an 18-month period. Secure Fence Act, Pub. L. No. 190-367, § 2(a), 120 Stat. 2638. The government argues that this "statutory obligation to achieve operational control over the Nation's borders within a matter of months" counsels against the granting of certiorari. Opp. 11.

In fact, exactly the opposite is true. The very speed with which the Secretary is obliged to complete the fence—and that he contends impels him to abrogate all manner of law in the process—makes it all the more imperative that this Court grant certiorari now to resolve the constitutional question definitively

B. Judicial Review Is An Essential Element Of The Intelligible Principle Standard.

The bulk of the government's Opposition consists of arguments on the merits. Put simply, however, there is no support in this Court's decisions for the government's position (Opp. 11) that *existence* of an intelligible principle is the sole consideration of the nondelegation inquiry and judicial review for compliance with that principle is entirely irrelevant. That contention turns on its head a fundamental pillar of separation of powers by arguing that absence of judicial oversight does not implicate constitutional concerns.

The government is unable to cite any case in which the Court has expressly stated that judicial review is *not* required to satisfy the intelligible prin-

ciple standard. Indeed, we have not been able to locate a decision of this Court upholding a delegation under the intelligible principle standard where the agency's compliance with the intelligible principle was not subject to such judicial review.

The cases on which the government relies (Opp. 19-23) all involve delegations *not* subject to the intelligible principle standard (see Pet. 17-19).[5] Thus, in each of the cases that it cites, the delegation was upheld without reference to the intelligible principle standard, either because there was no law to apply (*United Food & Commercial Workers* and *Lincoln*) or because of the Executive's inherent authority (*Waterman Steamship Corp.* and *Knauff*).[6]

Moreover, the government blithely ignores the repeated statements in this Court's opinions that judicial review is an important element of the intelligible principle standard. Pet. 13-15. While the government understandably prefers formulations that

---

[5] The government conceded below that the constitutionality of Section 102(c) is governed by the intelligible principle standard. See Pet. 19. Its assertion that it "possesses independent authority over the subject matter" (Opp. 13-14) is therefore irrelevant. And it plainly does not possess independent authority over the subject matter relevant here—the subjects of the waived statutes.

[6] The government's reference (Opp. 23) to *Students Challenging Regulatory Agency Procedures* is baffling, because the passage cited involved the district court's inability to grant interim relief, not a complete preclusion of judicial review. Similarly, *Franklin* and *Dalton* did not involve nondelegation claims. Moreover, the challenges in *Franklin* where entirely procedural—there was no assertion that the President failed to comply with the substantive statutory standard—and the statute in *Dalton* imposed no constraints on the President's discretion, the paradigmatic situation in which there is no law to apply.

do not mention judicial review, this Court in fact has referred to the courts' role in applying the standard.

Finally, the importance of judicial review here is confirmed by the government's half-hearted attempt (Opp. 20 n.8) to justify the Secretary's waiver. If all that is required for a waiver is that it "allowed the fence* * * to be constructed more expeditiously," then a waiver will be justified in any case in which any statute may possibly apply to construction of the fence. If Congress meant to adopt that incredibly lenient test, however, it simply would have enacted a blanket waiver itself and saved the Secretary the trouble of having to issue individual waivers. Congress intended a more focused inquiry, with the rationale spelled out by the Secretary—something that will occur only with statutory judicial review.

C. The Secretary's Waiver Is Equivalent To The Repeal Invalidated In *Clinton*.

To avoid *Clinton* v. *City of New York.*, 524 U.S. 417 (1998), the government attempts to distinguish "waiver" from "repeal" on the ground that "waivers" suspend the application of existing law "in one or more particular situations, while leaving them otherwise fully applicable." Opp. at 24-25. But the *Clinton* Court stated that the *practical effect* of the Executive's action, not the term applied to it, is dispositive. The government's distinction elevates form over substance by turning entirely on whether the relevant underlying law is broad or narrow. Waiver of a statute applicable only along the border, or only to construction of a border wall, for example, would deprive the law of all substantive force and effect, and be indistinguishable from repeal of such a law in its entirety.

The government also argues (Opp. 24) that the Secretary's waiver closely resembles the tariff waiver upheld in *Field* v. *Clark*, 143 U.S. 649 (1892). As we discuss in the petition (at 21-24), the waiver provision here is far different from the one before the Court in *Field*. The government asserts (Opp. 27-28) that those differences do not matter, but again it is unable to point to any precedent of this Court upholding under *Field* a provision with the unprecedented characteristics of Section 102(c). Moreover, a key factor in *Field*—also central to the Court's determination in *Clinton*—was whether the Executive's action is mandatory upon the occurrence of particular future events, and thus truly represents Congress's legislative decision. 143 U.S. at 693; see also 524 U.S. at 443-44. The discretionary waiver provision here fails that test. Review is warranted so that this Court may determine whether *Field*'s rationale applies in this very different context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW J. PINCUS
CHARLES A. ROTHFELD
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20036
(202) 263-3000

ROBERT DREHER
BRIAN SEGEE
Defenders of Wildlife
1130 17th Street NW
Washington, DC 20006
(202) 772-3225

Counsel for Defenders of Wildlife

DAN M. KAHAN
Counsel of Record
TERRI-LEI O'MALLEY
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

Counsel for Petitioner

JUNE 2008